

STATE OF MICHIGAN
COURT OF APPEALS

CHARTER TOWNSHIP OF HARING,

Plaintiff/Appellee-Cross-Appellant,

v

CITY OF CADILLAC,

Defendant/Appellant-Cross-Appellee.

UNPUBLISHED

August 23, 2012

No. 299683

Wexford Circuit Court

LC No. 08-020967-CK

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant and plaintiff both appeal from the trial court's final order following a bench trial. The court granted judgment for plaintiff on Count I of its complaint and granted judgment for defendant on Count II of plaintiff's complaint. We affirm.

I. DEFENDANT'S APPEAL

Defendant appeals the portion of the trial court's order mandating that defendant sell sewer service to plaintiff in the amount of 0.121 MGD (million gallons per day) pursuant to the contract entered into between defendant and Wexford County in 1980. Plaintiff is an express third-party beneficiary of the contract. Defendant asserts that the trial court committed three major errors: first, the court erred in determining that the phrase "additional capacity available" used in the 1980 contract referred to capacity available at the time a request to purchase such capacity was made; second, the trial court erred in determining that defendant in fact possessed additional capacity to sell to plaintiff; and third, the trial court erred in failing to determine the total capacity available in defendant's wastewater treatment system.

The phrase "additional capacity available" is found in ¶ 6 of the 1980 contract:

It is agreed by the parties the City shall sell additional capacity to the County to provide sewage treatment and disposal service for other areas within Haring Township, but outside the current Haring Township System, if the City has additional capacity available. At the time the County requests such additional services and the City determines it can provide the additional capacity, the parties agree to compute the additional buy-in costs the County is to pay the city.

The primary goal in the interpretation of a contract is to honor the intent of the parties. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003). A contract should be read as a whole, with meaning given to all the terms, to determine the intent of the parties. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003). Contract language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). A contract must be construed to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. *Klapp*, 468 Mich at 467-468. Contractual terms must be construed in context, *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 516; 773 NW2d 758 (2009), and interpreted to avoid absurd or unreasonable conditions or results, *Hastings Mut Ins v Safety King Inc*, 286 Mich App 287, 297; 778 NW2d 275 (2009).

A contractual provision is clear if it fairly allows one interpretation. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999). If a contractual provision is clear, this Court will enforce it as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). However, if, after a reading of the entire contract, its language can be reasonably understood in differing ways, the language is ambiguous and subject to construction. *Vushaj*, 284 Mich App at 515. In ascertaining the meaning of an ambiguous contract, a factfinder should consider all the circumstances, interpreting the contract in light of the apparent purpose of the contract as a whole, the rules of contractual construction, and extrinsic evidence of intent and meaning. *Klapp*, 468 Mich at 469.

It is undisputed that the average daily capacity of defendant's wastewater treatment plant at the time the 1980 contract was formed was 2.0 MGD. After the formation of the contract, defendant undertook several improvements to the plant to raise the plant's capacity to 3.2 MGD average daily flow. The improvements were funded by defendant; plaintiff did not pay a buy-in cost at the time the improvements were made. Defendant admits that the improvements to the plant did not benefit plaintiff at the time they were made.

Defendant argues that the phrase "additional capacity available" refers to capacity that existed at the time the contract was made. This is a labored reading of the provision. It requires the provision to be read either as anticipating a static level of development or providing for a circumstance that the parties would have assumed would expire, which would render the provision illogical. It would make little sense for the provision to provide that the city "shall sell additional capacity" if it is reasonably understood that the static level of additional capacity will evaporate with even minimal expansion of services. The provision also speaks of the "time" the additional capacity is sought and the determination is made that it can be provided. This presumes and anticipates a non-static capacity predicated on future circumstances, with determinations being made by all parties based on future needs and capacities.

Defendant also directs this Court to ¶ 17 of the 1980 contract, which reads:

It is agreed by the parties that the County, subject to the terms and conditions of an agreement between it and Haring Township, shall share in all future improvements and/or expansion to the City system used or to be used by the County when providing service within Haring Township which is the result of

any State or Federal requirement. The cost allocation of said future improvements or expansion shall be based on the same formula used to determine the buy-in costs in the attached Exhibit B. The County shall be also obligated subject to the terms and conditions of an agreement between it and Haring Township to share in the costs of modification of the City System used by the County in providing service to Haring Township in order to improve the quality of sewage treatment. The method used to compute the County's share of the cost shall be the same as that used to compute the buy-in costs in the attached Exhibit B.

Defendant argues that this provision demonstrates the intent of the parties that any additional capacity created in defendant's plant that is not jointly funded by defendant and the county is not to be considered "available" for purchase by plaintiff.

We find this argument unpersuasive. Paragraph 17 states that when future improvements or expansions are required under state or federal rules, and those improvements or expansions are or will be used by the county to benefit plaintiff, then the county must share in the cost of those improvements. It also speaks of the county sharing in the costs of modifications to improve the quality of sewage treatment. Thus, ¶ 17 speaks of the county's obligation under two specific scenarios whereby the city system is modified. This essentially indicates that if these two modifications impact capacity, then the costs are to be shared. However, this does not mean the costs of any and all improvements made that increase capacity must be shared. Moreover, there appears to be nothing in the contract that forbids the parties from considering the cost of the expansions to the wastewater plant when calculating the buy-in cost for additional capacity under ¶ 6.

Additionally, as the trial court noted, the parties used the phrase "present capacity" in another portion of the 1980 contract. If the parties had intended to limit the meaning of the phrase "additional capacity available" to a subset of the then "present capacity," it could have done so.

In sum, the language of the 1980 contract supports a finding by this Court that the phrase "additional capacity available" in ¶ 6 refers to capacity that is available at the time the request is made. The contract as a whole is forward-looking and contemplates changes to defendant's wastewater system and the Haring Township system. It appears contrary to the intent of the parties as expressed in the document to limit the phrase "available capacity" to capacity that existed at a fixed time.

We also reject the contention that the trial court's factual determination that defendant had available capacity to sell to plaintiff was clearly erroneous. In a bench trial, the trial court must make specific findings of fact and state its conclusions of law. MCR 2.517(A)(1). The trial court specifically found that defendant possessed sufficient additional capacity to sell plaintiff 0.121 MGD of wastewater treatment and sewer service. The trial court's determination is supported by the testimony of both expert and lay witnesses.

The trial court heard detailed testimony from Douglas Coates, a professional engineer. Coates testified that the documents he reviewed indicated that the plant had an average capacity

of 3.2 MGD. He also indicated that the plant was designed for a sustained peak monthly average flow of 3.5 MGD and could handle a peak daily flow of 4.5 MGD. Relying on defendant's own records of average flows into the plant, he concluded that average flow for 2006 was 2.34 MGD and that in subsequent years it had decreased, to the point where the last 12-month period for which there was data indicated an average flow of 2.1 MGD. The 2006 report prepared by defendant's engineers stated that the average flow from 2004 to 2006 was 2.1 MGD.

Coates accounted for defendant's contractual obligations by reviewing existing contracts that required defendant to provide wastewater treatment outside the city limits. Coates concluded that the maximum capacity that defendant was contractually obligated to provide other entities was 0.46 MGD, although only 0.28 MGD was actually being used in 2006. Coates also evaluated defendant's projected future growth, as stated in reports prepared by engineering firms employed by defendant. Coates determined that future flow projections would amount to another 0.35 MGD between 2006 and 2026, assuming maximum use of all existing sewage infrastructure.

Coates then took the average flow value of the plant (3.2 MGD) and reduced it by the average flow experienced by defendant in 2006 (2.1 MGD), the amount of contractual capacity being used in 2006 (0.28 MGD), and the projected increase in flows over 20 years (0.16 MGD). He then reduced this figure by 6 percent to account for the fact that some months experienced higher than average daily flows. Coates's ultimate opinion was that there was an unused capacity of 0.62 MGD available in 2006 at defendant's wastewater plant and that using this number would not compromise defendant's ability to meet its current and future needs and existing contractual obligations.

Coates additionally evaluated plaintiff's wastewater and determined that its organic characteristics did not require that the 0.62 MGD figure be further reduced, because defendant's wastewater plant could handle the organic load as well as the hydraulic load. Thus, in Coates's opinion, defendant's plant was in no danger of not complying with the discharge requirements of its National Pollutant Discharge Elimination System (NPDES) permit due to an increase in the amount of waste coming through the plant.

Coates also reran his calculations using several worst-case scenarios, including a current flow of 2.34 MGD based on the highest-ever volume of total flow and industrial flow and an assumption that the city would generate the entire 0.35 MGD of new flows during the contract period. Coates concluded that even under the worst case scenario, defendant would have 0.22 MGD available, almost twice the 0.121 MGD requested by plaintiff.

Coates testified that he applied "the Ten State Standard" in calculating current and average flows, which is the recognized industry standard in wastewater-treatment plant design. He testified that defendant's plant was not described in its NPDES permit as a plant that experiences "critical seasonal high hydraulic loading" and that he would not rate the facility that way. Engineering firms hired by defendant also did not treat the plant as a plant that experiences critical seasonal high hydraulic loading. Thus, in Coates's opinion, defendant's plant's capacity did not have to be measured with reference to the average flow during the seasonal period of high flows, but rather with reference to average flows over a 12-month period. Further, Coates demonstrated that even if peak flows were subtracted from the plant's peak-flow capacity of 3.5

MGD, defendant would have sufficient available capacity to meet plaintiff's request. Coates testified that backwash and recycled water within the plant was already factored into the plant's overall design basis and did not need to be separately accounted for.

To rebut the testimony of Coates, defendant offered the testimony of Gary Arnold. Arnold presented several hypothetical scenarios wherein defendant would have only 0.05 MGD available or may even have a shortfall of 0.13 MGD. Arnold used selected high-flow months from each year to establish current flow rates rather than taking a 12-month average. Arnold testified that he believed it was appropriate to treat the plant as undergoing seasonal high hydraulic loading, although he agreed the plant was not regulated as such. Arnold also added an additional "reserve" of 0.24 MGD or 0.36 MGD, representing a scenario where industrial flows recovered to the average 2005-2006 level or the peak level in 2006, respectively.

Arnold also used a "business-day" average flow for industrial users, taking the average flow over the number of days they were in operation rather than over 365 days of the year. Arnold compared this figure to the 3.2 MGD average capacity, despite the fact that this capacity is based on a yearly average. The trial court noted that Arnold's addition of the "reserve" figure to an average daily flow that was already derived from the highest-flow months of the year was, in effect, "double-counting." Because Arnold's figure for 2006 already included the highest industrial flows experienced in 2006, the court reasoned, there would be no reason to add an additional reserve amount to this figure.

Coates and Arnold both testified that approximately 35 percent of defendant's industrial flow is "non-contact cooling water." However, Arnold did not discount his calculations to account for the fact that 35 percent of the industrial flow had no organic load whatsoever, a fact noted by the trial court. This is significant, because Arnold also testified that, although he had not done a detailed analysis of the organic-load capacity of defendant's plant, he agreed that defendant could operate its plant at hydraulic flows above its average design capacity of 3.2 MGD and still comply with its NPDES permit.

The trial court found Coates's testimony reliable because it was consistent with the industry standard in wastewater-treatment design and consistent with the approach taken by engineering firms hired by defendant to assist in planning for its future wastewater needs. The trial court found Arnold's testimony not credible because of the errors noted above, the fact that Arnold did not rely on the "Ten State Standard" in making his calculations, and the fact that it appeared that Arnold attempted to maximize the demand on the wastewater plant in order to allow defendant to pursue its "equity in taxation" policy. This finding was not clearly erroneous in light of the detailed testimony given.

Although the bulk of the testimony concerning available capacity was expert testimony, the trial court did state that the lay witness testimony supported the conclusion that defendant did not act in good faith in determining that it lacked capacity. Precia Garland testified as defendant's interim city manager. Garland testified to defendant's ability to provide wastewater service to a Wal-Mart store in Haring Township. She testified that defendant had the capacity to serve the Wal-Mart. She testified that she was told by the previous service manager that wastewater service was not provided to the Wal-Mart, however, because of the city's "equity in taxation" policy. Garland testified to occasions where defendant accepted requests for sewer

service accompanied by annexation or an Act 425 (tax-sharing) agreement. Garland also testified to the decline of defendant's industrial flows over the last few years.

Peter Stalker testified as defendant's former city manager. Stalker testified that in 2009 defendant had an objective of accepting petitions for annexation of land that would include the extension of sewer services to that land. For example, Stalker testified that defendant had additional capacity sufficient to serve the Baker College property located in Haring Township, but would not extend service to that property without an Act 425 agreement. He testified to several examples where land was acquired by defendant through annexation or an Act 425 agreement and sewer service was extended. Stalker testified that his view as city manager was that capacity would be available under an Act 425 agreement, but not available under the 1980 contract, because of the city's policy of equity in taxation.

The trial court concluded that the lay testimony reinforced the conclusion that defendant's determination that it lacked capacity to sell to plaintiff was not made in good faith. Given that testimony, the positions held by the witnesses, and the court's authority to assess their credibility, the trial court's conclusion was not clearly erroneous.

Defendant also argues that the trial court's failure to determine total available capacity presents a problem to defendant, because "if the total available capacity is exactly 0.121 MGD, then the circuit court's decision effectively eliminates all of the City's available capacity and thereby blocks all growth and development in the City." This argument ignores the fact that defendant's future growth was already accounted for in Coates's testimony, which was credited by the court. Indeed, no scenario presented by either expert witness failed to add at least the 0.16 MGD of projected growth in the report prepared by defendant's engineers.

Defendant also argues that the trial court erroneously concluded that defendant had available capacity based on correspondence with plaintiff in which defendant indicated that steps could be taken to obtain additional capacity as long as there was equity in taxation. In fact, the trial court stated that it based the conclusion that defendant did not make its determination in good faith on many pieces of evidence, including the testimony of several former employees of defendant. Reversal is unwarranted.

II. PLAINTIFF'S CROSS-APPEAL

Plaintiff's cross-appeal concerns ¶ 1 of the 1980 contract, which reads:

The City agrees to sell and the County agrees to purchase sewage treatment and disposal service for the Haring Township System as described and set forth in the attached Exhibit A up to a maximum capacity of 100,000 gallons per day average daily flow. It is understood and agreed that the sale and purchase of such treatment and service shall not begin until such time as that part of the Haring Township System *located in the area described and set forth in the attached Exhibit A has been fully constructed and connected to the system.* [Emphasis added.]

Exhibit A to the 1980 contract is a map upon which, it appears, someone has hand-drawn a fuzzy black line delineating the area in question. Plaintiff argues that the *whole* of the parcels

bisected by this black line are entitled to service under this contractual provision, up to a maximum of 100,000 gallons per day.

The trial court determined that “no reasonable interpretation of the terms and conditions of the 1980 contract” would lead to the conclusion advanced by plaintiff. The trial court specifically noted that the 1980 contract permits plaintiff to expand the Haring Township System provided that it stays within the area marked in Exhibit A. The trial court concluded that the reasonable interpretation of the contractual language at issue was that the parties intended that defendant be obligated to provide service and allow hookups for properties and buildings *within* the described boundary.

“Located in” establishes a definite boundary of the area impacted by the provision. Paragraph 1 establishes a point in time, delineated by geographical boundaries and construction objectives occurring within, at which the parties agreed “that the sale and purchase of such treatment and service shall” begin. This is keeping with ¶ 4 of the 1980 contract, which provides, in relevant part:

The County, subject to the terms and conditions of an agreement between it and Haring Township, shall have the ability to expand the Haring Township System *within the area described and set forth in Exhibit A* attached hereto, so long as the quantity of wastewater emanating from the Haring Township System, as expanded, does not exceed the capacity set forth in paragraph 1 above. [Emphasis added.]

Thus, defendant is obligated to serve any future expansions of the Haring Township System *provided those expansions are within the boundary line of Exhibit A.*

Plaintiff argues that language found in the recitals of the 1980 contract indicates that the “Haring Township System” is not limited to the specific geographical area depicted in Exhibit A because it is instead viewed as simply a “system” located approximately within that area. Plaintiff relies on the following recital:

WHEREAS, the County proposes subject to the terms and conditions of an agreement between it and Haring Township to assist Haring Township in facilitating the construction, financing, operation and maintenance of a sanitary sewer system in Haring Township (the “Haring Township System”) in the area described and set forth in the attached Exhibit A hereto

While plaintiff is correct that the phrase “Haring Township System” refers to a sanitary sewer system in Haring Township, the 1980 contract is clear that the phrase refers to a sanitary sewer system located within the geographical boundaries described in Exhibit A. Reversal is unwarranted.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey